No. 16,041

United States Court of Appeals

For the Ninth Circuit

CHARLES E. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the grand jury indicted James Burton Ing, Raymond Wright, Appellant Charles E. Smith, John Walker, Dewey Taylor and Lemuel Ashley Williams. The indictment was filed in the District Court for the District of Alaska, Third Judicial Division at Anchorage and consisted of twenty counts charging James Burton Ing and Raymond Wright and various of the other defendants with uttering and publishing forged checks in violation of Section 65-6-1 ACLA 1949. (Tr. 3-22.)

Appellant was named only in Counts I through V of the indictment along with Ing and Wright.

The defendants Walker, Taylor and Williams entered pleas of guilty and testified for the Government at the trial.

The trial of Ing and Wright on all counts of the indictment and of Appellant Charles E. Smith on the first five counts was completed on February 28, 1958. Smith was found guilty on Counts I, III, IV and V and not guilty on Count II. (Tr. 24.) Ing was found guilty on all counts of the indictment and Wright found guilty on all except five counts. The proof insofar as the Appellant Smith was concerned had little in common with that applicable to Ing and Wright who were charged with being the ringleaders of the check passing scheme. Separate counsel represented each of the parties.

On March 3rd, 1958 Appellant was sentenced to imprisonment for 5 years on each of Counts I, III, IV and V to run concurrently, with 2 years suspended on condition he make restitution. (Tr. 25-26.)

The U. S. District Court had jurisdiction of the indictment and trial under the provisions of Sections 53-1-1, 53-2-1 and 65-6-1 of Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Sections 1291 and 1294, Chapter 83, New Title 28 U.S.C.

STATEMENT OF THE CASE.

The determination of what the writer considers to be Appellant's strongest point on appeal will turn on the answer to the following question which is in part a statement of the case.

"Where a defendant was arrested in Seattle on Friday, March 15, 1957 at 3:00 o'clock P.M. without being advised of the reason for the arrest or shown any warrant, was taken to the King County Jail without being advised of his rights, interrogated by arresting officers until 6:00 or 6:30 P.M. of that day when he finally signed a consent to extradition, and was interrogated again for at least one hour on Saturday, March 16th and again interrogated on Sunday, March 17th for approximately 3 hours at the beginning of which interrogation he was told by an Alaska police officer that he had better make a statement and that it would be made known up here (in Alaska) and go easier on him if he did make a statement, after which time a confession was finally obtained, and the defendant having been prevented by the interrogators from conferring with his attorney during the latter portion of the Sunday interrogation although counsel was at the door of the interrogation room demanding admission, and

Where the defendant was possibly then arraigned in Seattle on Monday, March 18th or Tuesday, March 19th (confusion—and real question of whether defendant was actually arraigned) and then returned to Anchorage, Alaska, in the constant custody of the Special Agent who obtained and wrote the confession,

who discussed the confession with the defendant en route and obtained admissions from the defendant reiterating statements contained in the confession, and

Where the defendant was then arraigned in Anchorage, Alaska, on Thursday, March 21st, waiving preliminary hearing (without counsel) and placed under $10,000 bail (concededly a legal arrangement and probably the first) and retained in custody until April 4th when bail was reduced to $2,500.00 and release effected and counsel obtained, and

Where the defendant, during the period he was still in jail in Anchorage, was frequently visited by the same Special Agent who obtained and wrote the confession and who accompanied him to Alaska, was taken from the jail by that Special Agent to the office of the United States Attorney for questioning on the confession where he verified the statements in the confession and again on March 27th was taken from jail by the same Special Agent in the company of other officers to make a tour of the Anchorage area for the ostensible purpose of identifying roads and places mentioned in the confession and also taken to Alaska Territorial Police headquarters where he was questioned on the confession, and again reiterated the statements contained in the confession (still being without counsel) and

Where the trial Court ruled the confession inadmissible because of violation of Rule 5, Federal Rules of Criminal Procedure, and because of duress and coercion,

Was it error for the trial Court to then permit an officer of the Territorial Police to testify and relate the admissions made by the appellant on March 27th under the before mentioned circumstances?

The above statement of facts, in the form of a question, is based on the testimony of appellant which is summarized in the following paragraphs with transcript references. Appellant's testimony is contradicted in part by the testimony of Special Agent Edward Harkabus which is also summarized with transcript references.

The two Alaska officers who witnessed the confession and took part in the interrogations were not present at the trial. Lt. Trafton of the Territorial Police was on vacation in Japan and Detective Pass, dismissed by the Anchorage Police Department in October of 1957, was under doctor's care in North Carolina. (Tr. 180-182.)

The appellant Smith was arrested at the home of his mother and father in Seattle, Washington, on Friday, March 15, 1957, at about 3:00 in the afternoon by Lt. Trafton of the Alaska Territorial Police, Detective Pass of the Anchorage Police Department and Sheriff Weeland of King County, Washington. (Tr. 193-194.) The officers were accompanied by a Mr. Harkabus, a special agent for the Board of Fire Underwriters and former FBI agent.

According to appellant Smith's testimony, he was talking on the telephone to the police car of Sheriff Weeland, on a "pretext call", when the officers

knocked on the back door of the house. Appellant's mother answered the door and stated in response to a question by the officers that the appellant was not at home. According to appellant, the officers pushed his mother aside and came on in the house, Sheriff Weeland stating to appellant that he was under arrest. No warrant was shown to the appellant nor was he advised of any charge. (Tr. 193-194.) Appellant was immediately taken in the sheriff's car to the King County Jail in Seattle and to the sheriff's office where he was questioned by Trafton, Pass and Harkabus. (Tr. 195-196.) Appellant was in the office about three hours and in addition to the questioning he was requested to sign extradition papers which he at first refused to do. He likewise refused to make any statements concerning the matters he was being questioned on. Finally, about 6:00 or 6:30 o'clock P.M., in the sheriff's office, appellant signed the papers which would permit him to be returned to Alaska, which he believes were extradition consents. (Tr. 197.)

After signing the papers appellant was taken back to his cell where he remained alone until about noon of Saturday when he was taken out of the cell to an anteroom in the same area to be questioned by Lt. Trafton and Detective Pass. (Tr. 198-199.) After one hour of questioning during which time appellant made no statements concerning the matters on which he was being questioned, he was returned to his cell. (Tr. 199.) On Sunday about 12:30 o'clock P.M. he was taken out of his cell again and into the same anteroom where he had been questioned the preceding day. On this occasion Lt. Trafton, Detective Pass and Special

Agent Harkabus were present in the room. At the commencement of this interview appellant was advised by Detective Pass that he had better make a statement. (Tr. 200.) He was in the room approximately 3 hours. (Tr. 200.) After appellant had been in the room for a period of about two and one-half hours with the three officers beforementioned, the jailer came into the anteroom and advised that there was an attorney outside who wished to see appellant. (Tr. 200-201.) The jailer was advised by Mr. Harkabus that the attorney could see appellant when the officers had finished their questioning. (Tr. 200.) Approximately 15 minutes later the jailer returned and stated to the officers that it was his opinion that appellant had a right to see an attorney and that an attorney was waiting to talk with appellant. The jailer was then advised by Harkabus that the attorney could see appellant in a few minutes. (Tr. 201.) On the second occasion the jailer again remarked that appellant had a right to see his attorney. (Tr. 201-202.) Shortly thereafter the jailer appeared at the door of the anteroom and by his side was the attorney. The attorney came to the doorway and asked appellant if there was anything appellant wished to see him about. (Tr. 202.) The attorney's name was Harris and had been sent to the jail to interview appellant by appellant's father. (Tr. 203.) At the time appellant's attorney was standing at the door of the anteroom with the jailer, appellant was sitting at the table with Special Agent Harkabus and Lt. Trafton. Detective Pass was standing near the table. None of the officers made any statement when the attorney ap-

peared, and in response to the attorney's question appellant stated that there was nothing for him to see the attorney about. (Tr. 203.) At the time the attorney appeared the officers were in the process of writing down statements from the defendant concerning his implication in the crime charged in the indictment. (Tr. 203-204.) The officers made no statement to appellant that he had a right to see his attorney or could leave the room in the attorney's and jailer's company in order to confer. (Tr. 204.) Up to the time the attorney appeared appellant had signed no statement, but was ready to sign a statement which Harkabus was in process of writing out in longhand. (Tr. 204.) Immediately after the attorney left, appellant signed the longhand statement which had been written out by Harkabus. (Tr. 204.) According to appellant's recollection the statement which was written out in longhand by Harkabus was preceded by a statement reading roughly to the effect, "This statement will not be used against you." (Tr. 205.) That evening a typewritten statement was given to appellant to sign. Appellant was brought out of his cell and into the anteroom again about an hour after the signing of the longhand statement in order to sign the typewritten statement. (Tr. 205.)

Appellant states that he was never advised by any of the officers that he needn't make any statement if he did not want to. (Tr. 205-206.)

Appellant states that the reason he did not get up and demand to see his attorney is that by the time the attorney finally got in the room the statement had

been practically written out by Harkabus and he, appellant, "didn't want to cause any trouble" and "it was just about over with." (Tr. 206.)

During the interview just mentioned and prior to the making of the statement appellant states that Detective Pass advised appellant that if he would cooperate he (Pass) would see that it was known up in Alaska where appellant was to be returned.

The statement was finally signed around 5:00 or 5:30 o'clock P.M. on Sunday. (Tr. 206.) After signing, appellant was returned to his cell where he remained until he was called into a Commissioner's office where a hearing was held, the exact nature of which seems to be vague in appellant's mind. Attorney Harris was present, a judge was in the room and extradition was discussed. Appellant's recollection is that Attorney Harris was arguing that appellant was wrongfully arrested and denied the right to counsel and that Harris was fighting extradition. (Tr. 207-208.) Appellant was asked no questions and took no part in the proceeding but sat near his mother and father during the entire hearing. After the hearing which lasted about a half hour he was returned to his cell where he remained for a day or two until he was placed on an airplane to come to Anchorage, Alaska. (Tr. 208.)

Appellant was accompanied on the trip to Alaska by Special Agent Harkabus, riding "two-abreast" on the airplane. Harkabus discussed the statement with appellant during the trip and caused appellant to admit its truth. (Tr. 133-135.)

Appellant was placed in the Federal Jail upon his arrival in Anchorage where he remained for about two days when he was taken before the United States Commissioner and a complaint read to him. Appellant states that he was advised of his rights on that occasion and signed a slip which he understood was a waiver of a preliminary hearing. (Tr. 208-209.) Appellant remained in jail approximately another 10 days under bail in the amount of $10,000.00. (Supp. Tr. 295.) During the 10-day period he was taken from the jail on several occasions by Detective Pass and Special Agent Harkabus. (Tr. 134-135.)

During the time appellant's attorney was attempting to see him in the King County Jail argument occurred between the attorney and Harkabus and Detective Pass because the attorney was prevented from seeing appellant. (Tr. 212.)

Appellant states that never to his knowledge was he arraigned in the State of Washington. (Tr. 214.)

On the Sunday on which appellant signed the written statement and prior to the signing, he was advised by Detective Pass that if he would make a full confession it would go a lot easier with him, or words to that effect. (Tr. 218.) Appellant's own phrasing of the statement made by Detective Pass is that if he would cooperate it would go a lot easier on him. (Tr. 218.) The statement was made immediately after the statement by Detective Pass.

Counsel for appellant Smith objected to the introduction of the typewritten statement in evidence and the objection was sustained. (Tr. 227.) The Court

stated that the officers had not complied with Rule 5, too much time had elapsed between the date of arrest and the day of the first arraignment and upon those facts plus others there were sufficient grounds to refuse to permit the confession to be introduced. (Tr. 227.)

Plaintiff's Exhibit No. 23 for identification was never introduced into evidence. It is set out verbatim in supplemental transcript at pages 294-295. This exhibit indicates that the original complaint against the appellant was issued on March 14, 1957, that a warrant issued on the same date. On March 21, 1957 the defendant appeared without counsel and according to the transcript of proceedings was advised of his rights and waived preliminary hearing. Bail was set at $10,000.00. (Supp. Tr. 295.)

After the Court had sustained defense counsel's objections to introduction of the confession the United States Attorney then stated that he proposed to call as witnesses police officers who would testify to admissions made by the appellant indicating his guilt after he had been arraigned in Anchorage. Counsel for appellant objected on the ground that the violation of Rule 5 of the Federal Rules of Criminal Procedure in Seattle when the confession was obtained would carry over and destroy the protection afforded by Rule 5. (Tr. 238-239.) Counsel for appellant argued that the coercion exercised on appellant while he was in custody in Seattle and under constant questioning by the officers which resulted in an illegal confession, continued on during his transfer to Alaska

(he was closely accompanied on the airplane trip to Alaska by Special Agent Harkabus) where he was placed in the Federal Jail under $10,000 bail, taken out of the jail on at least two occasions by the same officers and driven around town for the purpose, as they stated, of having him identify places and events mentioned by him previously in the illegal confession. (Tr. 136.) Counsel for appellant's argument was that the whole reason for the rule would be destroyed if such actions on the part of officers were permitted and the decision in the *Mallory* and other Supreme Court cases would mean nothing. (Tr. 240.)

In excluding the confession the Court relied on a violation of Rule 5 and in addition ancillary facets such as the promises. (Tr. 247.)

The Court overruled the objection to allowing Territorial Police Officer Dankworth to testify concerning admissions made by appellant in Anchorage, Alaska. (Tr. 247.)

The witness Dankworth then took the stand and stated that he was employed by the Alaska Territorial Police and that he had occasion to talk with appellant on March 27, 1957. (Tr. 249.) The conversation took place in Territorial Police headquarters in Anchorage, Alaska, with appellant, Special Agent Harkabus, Detective Pass and Dankworth present. (Tr. 250, 256.) Over counsel for appellant's objection the witness Dankworth was permitted to repeat the conversation in full after being advised by the Court at the bench that he was to make no statement concerning a written confession. (Tr. 251.) Appellant's request

for a hearing on the admissibility of the evidence was denied. (Tr. 250.)

The witness Dankworth then testified that he was to interview the appellant with Special Agent Harkabus about a matter having nothing to do with the present case, that after the interview was concluded the appellant Smith then made a statement to the effect that he had been involved in the check cashing deal. (Tr. 252.) That he wanted to plead guilty, serve his time and did not want to be a stool pigeon. (Tr. 252.) The witness Dankworth then went on to repeat from memory a great portion of the matters contained in the confession obtained in Seattle although not in the same order as set out in the written confession itself.

The appellant was also in the custody of Detective Pass as well as Special Agent Harkabus at the time Dankworth reports he made the admissions which involve him in the same crime for which he was being tried. (Tr. 256.) According to the witness Dankworth all of the voluminous admissions made by the appellant Smith were volunteered spontaneously by Smith, or casually, after he had completed discussing the matter he was originally taken to Dankworth's office to discuss. (Tr. 256-257.) Dankworth did admit that he had discussed the matter with Mr. Plummer before going into Court. (Tr. 257.) Counsel for appellant moved to strike the testimony of the witness Dankworth. (Tr. 257.) The motion to strike was denied. (Tr. 264.) The Court gave as its reason the fact that although there may have been duress and coercion

used against appellant Smith prior to the time he was arraigned the fact that he was arraigned in Seattle and again before the United States Commissioner in Anchorage permitted the testimony by the officer of the admissions to be allowed into evidence. (Tr. 265.)

The testimony of Edward J. Harkabus, who plays a more important role in the particular points involved in this appeal than any other officer, reveals that he ordinarily resided in Fairbanks, Alaska. (Tr. 120.) He was called as a witness by the United States Attorney and testified that he saw the appellant Smith in Seattle on March 17, 1957 which was on Sunday and was asked the question whether the appellant Smith had made any statements to him, Harkabus, concerning Smith's participation in the Morrison-Knudsen check swindle. (Tr. 121.) Counsel for appellant objected, whereupon the Court excused the jury and agreed to try the admissibility of the signed statement made by appellant Smith. (Tr. 122.) Spectators were excluded from the courtroom. (Tr. 122.)

Harkabus then testified on direct that he was a special agent with the National Board of Fire Underwriters, saw the appellant in Seattle on March 17, 1957, interviewed him concerning the Morrison-Knudsen check swindle and during the interview appellant made statements concerning the matter. (Tr. 126.)

Harkabus volunteered on direct that during a portion of his interview with Smith, a Seattle attorney by the name of John Harris, a former assistant United States Attorney, was present; that Harris was

present for the purpose of representing Smith. (Tr. 126.)

On direct examination Harkabus testified that after appellant was arraigned in Anchorage on March 21, 1957 appellant was taken to U. S. Attorney Plummer's office and in Harkabus' presence and in Detective Pass's presence the United States Attorney went over the signed statement with appellant. Appellant was asked if he had any additional knowledge other than that set out in the statement; that the appellant stated no, that he wanted to plead guilty to the charge, begin service of his sentence and get it over with. (Tr. 134-135.)

Harkabus also testified that on March 27, 1957 he was present in Territorial Police headquarters with appellant, Detective Pass and Officer Dankworth of the Territorial Police when the conversation concerned appellant's written confession and that appellant at that time "reiterated the veracity of the statement". (Tr. 136.)

(Tr. 136) : Harkabus admits that Sgt. Laird of the Territorial Police, Detective Pass and he, Harkabus, went over the statement with appellant Smith, took the appellant around in an automobile, asked that he point out the various locations of the roads mentioned in the statement.

On cross-examination Harkabus admitted that the first time he saw Smith in Seattle was on March 15, 1957 in Renton, Washington. Harkabus admitted that he accompanied the sheriff of King County and De-

tective Pass and Lt. Trafton in the police car to the home of appellant's mother and father. (Tr. 138.) Harkabus states that he thought Detective Pass had the warrant. (Tr. 139.) He says he did not look at the warrant in detail. His recollection is that he just gave it a passing glance but he thought the warrant was for forgery. (Tr. 139.)

Harkabus states that he was with the other three officers on March 15, 1957 because he wanted to interview Smith in connection with another matter, that he came down as a guard for the U. S. Marshal's office in Fairbanks. (Tr. 140.)

Harkabus did not read the warrant. (Tr. 140.) He says Detective Pass showed it to him but is not sure when this was done. (Tr. 140.) Harkabus admits that Weeland of the sheriff's office made a pretext call to Smith at his residence to determine whether he was at home. (Tr. 141.) When the police car drove up to the residence of appellant's mother and father, all the officers with the exception of Harkabus went to the rear door. (Tr. 141.) Harkabus says he got out of the car and walked toward the front fender, the car being parked in the front driveway near what would ordinarily be used as the front entrance. (Tr. 141.) Harkabus estimates the distance along the driveway from where he was standing to the point of the Smith residence where the three officers entered to arrest Smith as being approximately 50 feet. (Tr. 143.) Harkabus could not see the door the officers actually knocked at or entered, if they did enter. (Tr. 142.) Harkabus says he does believe he remembered hearing the

sheriff announce his identity. (Tr. 144.) He is not positive, however, and heard nothing else in connection with the arrest. (Tr. 144-145.)

Harkabus estimates that Smith was taken to the King County Jail at approximately 4:30 in the afternoon. (Tr. 147.) Harkabus says that Smith was immediately taken to be interviewed by Detective Pass and Lt. Trafton and that he, Harkabus, was in on the first part of the interview. He testifies, however, that he first questioned appellant on matters that concerned him (Harkabus) and took no further part in the interview that occurred on the day of the arrest. (Tr. 148.)

Harkabus testified that Detective Pass of the Anchorage Police Department advised appellant that he was entitled to counsel and that he need not make a statement at the commencement of the first interview. (Tr. 150.) He verifies appellant's statement that the Sunday interview was conducted by himself, Detective Pass and Lt. Trafton of the Territorial Police. (Tr. 151-152.) Harkabus, however, did most of the interrogating. Harkabus testifies that appellant had been in the interrogation room for about 45 minutes on Sunday, March 17th, when he admitted complicity in the crime with which he was charged. (Tr. 153.) Harkabus' testimony concerning appellant's attorney's attempt to contact appellant during the Sunday interview is contained in Tr. 153-161.

Appellant denies that he was arraigned before a commissioner in Seattle on the 19th day of March, 1957 and states that to the best of his recollection the

entire discussion in the Commissioner's room on that date was concerning the extradition papers he had signed. (Tr. 217.) Harkabus on the other hand testifies that appellant was arraigned in Seattle on March 18, 1957 before a Commissioner. (Tr. 172-174.) On the other hand and for some unknown reason the United States Attorney caused appellant to be arraigned on March 21, 1957 after his removal from Seattle to Anchorage, Alaska. The government's exhibit No. 23 for identification, which was never actually admitted into evidence (Supp. Tr. 294-295) so indicates.

Counsel for appellant objected to the admission into evidence of appellant's confession (Government's exhibit No. 20 for identification, Supp. Tr. 287). (Tr. 227.)

The Court rejected counsel for appellant's request that the Court convene out of the presence of the jury to determine the question of whether or not Territorial Police Officer Dankworth's testimony concerning appellant's admissions should be admitted. (Tr. 235.)

The Court overruled counsel for appellant's objection to the testimony of Officer Dankworth and counsel's request that a hearing be held in connection with the circumstances under which the evidence to be adduced from Officer Dankworth was obtained. (Tr. 250.)

After Dankworth's testimony had been given, counsel for appellant filed a written motion to strike the testimony and argued the merits of the motion to the

Court commencing at Tr. 258. The motion to strike was denied. (Tr. 264.)

During the United States Attorney's final argument to the jury the following occurred commencing on page 271 of the transcript:

"Now, there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government——

Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right of the defendant (283) may have.

The Court. Well——

Mr. Plummer. I didn't mention anybody, except, why didn't they put on a defense.

The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay. They refer to three individuals at this counsel table, and no one else.

The Court. Of course, that is true.

Mr. Plummer. I didn't say—may counsel approach the bench for just a moment?

The Court. I don't think it's necessary, counsel. Let's proceed.

Mr. Plummer. Fine. Now, also, I think . . ."

SPECIFICATIONS OF ERROR.

1. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police officer, containing admissions made by appellant while in custody without first holding a private hearing to determine whether the admissions had been voluntarily made. Such a hearing was denied.

2. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police officer, containing admissions made by appellant while still in the same custody and under the same pressures that existed when his confession was illegally obtained, the admissions containing the same information as the confession which was held to be inadmissible because, taken before prompt arraignment, upon promises of leniency and during a time when appellant was prevented from seeing his attorney.

3. The trial Court erred in refusing to instruct the jury that the admissions of appellant while in custody testified to by M. E. Dankworth must have been voluntarily made.

4. That the trial Court erred in refusing to strike the testimony of the witness M. E. Dankworth pursuant to timely motion by appellant.

5. That the U. S. Attorney committed reversible error in commenting on the failure of the appellant to take the witness stand and the trial Court erred in failing to properly instruct the jury after the U. S. Attorney's comments.

6. That the trial Court erred in refusing to permit appellant to inspect the confession taken from him

prior to its attempted introduction into evidence during the course of the trial.

SUMMARY OF ARGUMENT.

The trial Court was convinced that appellant was not timely arraigned and that duress and coercion were used and refused to admit the confession in evidence.

Counsel for appellant repeatedly pointed out to the Court that after the confession was illegally obtained, and while the appellant was still in custody under high bail without counsel and under the same pressures that brought about the illegal confession, the admissions verifying the illegal confession were obtained. Except for the illegal methods used to extract the confession and continued pressures there would never have been later admissions.

The admissions made under the circumstances were the fruits of the wrongdoing of the officers.

If evidence obtained in this fashion is held to be admissible then the effect of such Supreme Court decisions as the *McNabb, Carignan, Mallory* and *Nardone* cases is destroyed.

The Court refused to instruct the jury that the later admissions made by appellant while still in custody, under high bail and without counsel, which reiterated the contents of the illegal confession, must have been voluntarily made.

Appellant's objection to admission of the testimony of the Territorial Police officer who repeated

appellant's verification of the confession was overruled. Appellant's motion to strike that officer's testimony was denied.

The U. S. Attorney in closing argument committed reversible error in twice commenting on the failure of the defendants "to put some evidence on" which comments were emphasized by him again after objection was made by defense counsel. The trial judge then made matters worse by stating (in overruling the objection) that if the U. S. Attorney had referred to an "individual" then he would concur with defense counsel and (Tr. 270) in finally agreeing that the U. S. Attorney's references were to the "three individuals" (co-defendants) at counsel table.

The trial Court, in denying appellant's motion to inspect and photograph confessions, made under Rule 16, Federal Rules of Criminal Procedure, abused its discretion because the ruling was not based on the ground that the confessions were not material to the defense or that the request was unreasonable.

ARGUMENT.

SPECIFICATIONS 1 THROUGH 4.

Specifications 1 through 4 will be discussed together in the following argument.

Appellant's testimony contradicts that of Special Agent Harkabus in a few important particulars, otherwise their account of what happened commencing with the arrest and until appellant was released on bail is essentially the same.

Each point of contradiction, however, occurs over an important question of fact.

Harkabus maintained that there was a warrant in the possession of Detective Pass when the arrest was made. He didn't remember clearly where he saw it or what it said. Notice his testimony at Tr. 139-140, 146. Appellant's testimony on this point appears at Tr. 194, 213. The Court will note that the warrant that was supposed to have been used was issued at Anchorage, Alaska, on March 14, 1957. The arrest was made in Renton, Washington, at 3:00 P.M. March 15, 1957.

Harkabus insists appellant was informed of his rights by Detective Pass. (Tr. 148, 150.) Appellant's testimony on this point appears at Tr. 196-197, 211 and is a direct denial that he was ever informed that he needn't make a statement and that he could see an attorney.

Appellant's testimony on the matter of Attorney Harris' attempts to see him on Sunday, March 17th, are clear enough. (Tr. 200-204.) Harkabus' testimony on this point is found at Tr. 153-161 and is evasive to the point of being unintelligible in places and highly improbable otherwise.

Harkabus claims appellant was arraigned on Monday, March 18, 1957 (Tr. 173) and appellant denies this (Tr. 216-217), stating that the Seattle hearing was concerned mainly with extradition.

Why, if the alleged legal arraignments in Seattle actually took place on March 18, 1957, the appellant was again arraigned in Anchorage on March 21, 1957

was never clarified. Appellant's recollection of the Anchorage arraignment is very clear. (Tr. 209.)

The laboring oar for the Government was manned by the witness Harkabus who was not an officer of any Alaska law enforcement agency, but a special agent for the Board of Fire Underwriters. He was not present at the scene of the arrest according to his own testimony, took part in only some of the series of interrogations leading up to the confession, had no interest in the crime with which appellant was eventually charged and did not witness the confession. Yet, he testified with certainty that Detective Pass advised appellant of his rights, that appellant's arrest was without criticism, that a warrant was shown, that appellant confessed rather freely, had ample opportunity to confer with counsel and was properly arraigned in Seattle. He even attempted to volunteer to the Court what he apparently thought or had been told was a vital bit of evidence to the effect that Detective Pass had tried to arraign appellant on the day he was arrested. (Tr. 217.) Counsel for appellant was blamed by the Court for asking the question that elicited the information but an examination of the transcript will show that Harkabus volunteered the information.

All in all, Harkabus' activities in the case show him up to be a general agent of the Territory of Alaska rather than a special agent of the Board of Fire Underwriters—if all of his testimony can be believed. The trial Court observed him on the stand and did not give him enough credence to admit the written confession.

Regardless of whether the Seattle arraignment was a legal one or not, the fact remains that appellant was arrested at 3:00 P.M. Friday with no attempt being made to arraign him until Monday. The written confession was obtained after long hours of interrogation with appellant's attorney attempting to force his way into the interrogation room during the latter portion of this session.

After the hearing in Seattle we again find Harkabus in the picture riding side by side with appellant on the airplane trip to Anchorage and questioning him on the matters covered in the confession.

After arraignment in Anchorage on March 21st appellant was still confined in the Federal Jail under $10,000 bail and without counsel. Again Harkabus is on the scene, leading appellant from jail and around town, in the company of other officers, for the purpose, as Harkabus put it, of identifying places mentioned in the confession with appellant being questioned by the officers regarding the confession.

On March 27th the appellant is supposed to have repeated practically verbatim the contents of the confession in the presence of Territorial Police Officer Dankworth. On this occasion appellant had been taken from jail by Harkabus, Pass and Sergeant Laird to point out places mentioned in the confession and in the course of the trip the party dropped into Territorial Police Headquarters where appellant was again questioned on the confession. According to Officer Dankworth appellant practically volunteered to repeat again everything that had been written in the

confession by Harkabus which he signed. The Court's attention is invited to the testimony of M. E. Dankworth commencing at Tr. 248; the repetition from memory by Dankworth of what appellant purportedly said almost a year previously at Tr. 253 and asked to compare Dankworth's statements with the confession itself. (Supp. Tr. 287.) And to consider Dankworth's statement at Tr. 257 to the effect that he had refreshed his recollection by discussing the case with Mr. Plummer (U. S. Attorney). It appears quite probable that Dankworth read the illegal confession again in Plummer's office before trial and was repeating it from a memory of that reading.

This testimony was admitted over appellant's objection. Appellant's demand for a hearing on the voluntariness of the alleged re-confession was denied as was the later motion to strike. Appellant requested that the question of the voluntariness of these statements be put to the jury and this request was denied. (See 2nd Supp. Transcript not printed as of this writing.)

Leyra v. Denno, Warden, 347 U.S. 556 (1954), came up from the New York State Courts and was decided on the Fourteenth Amendment. That case held that other confessions, made after the coerced confession, were not admissible. The principle of this case was considered and approved in *Burwell v. Teets,* 245 F. (2d) 154, 9th C.C.A. (1957), where the Court said at page 162:

> "Of course, when an earlier confession has been coerced and a later one cannot be separated from the earlier one, and is but a continuation and

still the product of the earlier coercion, the later confession may not be used whether the first is excluded or not."

Although based on an interpretation of the leeway permitted by the Federal Communications Act (47 U.S.C. 605), the case of *Nardone v. U.S.,* 308 U.S. 338, 341, appears to be entirely applicable to this case. There the Court held that facts improperly obtained do not necessarily become sacred and inaccessible, if knowledge of them is gained from an independent source, but that knowledge gained by the Government's own wrongdoing cannot be used by it simply because it is used in a derivative manner. In *Silverthorne Lumber Co. Inc. et al. v. U.S.,* 251 U.S. 385, 392, it was held that the Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books for use in a criminal proceeding against them where information upon which the subpoenas were framed was acquired by the Government through a previous unconstitutional search and seizure. The Court said at page 392:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely the evidence so acquired shall not be used before the Court but that it shall not be used at all."

There appears to be no question but that Rule 5a of the Federal Rules of Criminal Procedure was violated and the ruling of the trial Court based on *McNabb v. U.S.,* 318 U.S. 332, and *Mallory v. U.S.,* 354 U.S. 449, excluding the confession was correct.

Can the illegal confession then be used by the same officers as a means to pry from the defendant reiteration of the confession, after arraignment, and thus purify the same evidence?

If so, then Rule 5a of the Federal Rules of Criminal Procedure no longer has any force or meaning. A legal means of circumventing the rule has been established. No informed officer would bother to cause arraignment "without unnecessary delay". The officer would stand a better chance of "making his case" if he immediately commenced interrogation in the hope of getting a confession and then purifying the confession, so to speak, in the filter of what would then be meaningless procedure as far as the defendant was concerned.

The words "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him" (*Mallory v. U.S.*) would become a standard rule of operation for informed officers. Why shouldn't a conscientious officer be thus guided if such procedure is held to be legal?

There is no question but what the chances of obtaining a confession are increased if arraignment is deferred for questioning. Once a confession has been obtained the defendant stands naked before the officers. Arraignment then has little or no meaning to him in his despair. What purpose is served by informing him that he need not make a statement when he has already stated everything with the encouragement of the arresting officer? What can it mean to the defendant in this predicament to advise him that he is

entitled to counsel, when he knows, or thinks he knows, that there is nothing that counsel can do to save him now? Or to tell him that anything he says might be used against him when he knows that he has already said everything and is by that time only wondering what his fate will be?

Would it be difficult for the same officers then, on the pretext of discussing some part of the confession with the defendant, to get another admission of its veracity? Our knowledge of human nature tells us no. The bars of protection, once lowered, are down forever.

Rationalizing to permit the use of evidence procured and purified in this manner destroys the protection intended by Rule 5 of the Federal Rules of Criminal Procedure and the Constitution. The intent was to give the accused an arraignment when it would mean something to him and prevent abuses by arresting officers.

THAT THE U. S. ATTORNEY COMMITTED REVERSIBLE ERROR IN COMMENTING ON THE FAILURE OF THE APPELLANT TO TAKE THE WITNESS STAND AND THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AFTER THE U. S. ATTORNEY'S COMMENTS.

An examination of the authorities on this point discloses that while most Courts recognize the rule that the prosecuting attorney shall not comment on the failure of a defendant to take the witness stand in his own behalf and call such comments "grave error", generally in the cases reported and examined

by the writer the decisions have generally found some reason to condone the alleged objectionable remarks. Either because defense counsel had himself provoked the prosecuting attorney's comments or on the particular peculiar facts of the case.

In *Wilson v. U.S.,* 149 U.S. 60, the prosecuting attorney in his enthusiasm said:

> "If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of that crime."

The above comments were held to be a violation of the defendant's constitutional rights. On the other hand, in *Jackson v. U.S.,* 102 Fed. 473, 487 (C.C.A. 9th), the comment, "Why didn't the defendant put a sworn witness on the stand" was held not to be construed as a comment on defendant's failure to testify.

In this case the District Attorney said:

> "Now, there is also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government . . ." (Tr. 271.)

From the authorities examined it would appear that the comment, "Why didn't they put on some evidence? Why didn't they put some evidence on?"

ould not be held to be a violation of the defendant's onstitutional rights.

However, it will be observed from an examination f the transcript that the U. S. Attorney was still lking when interrupted with an objection. The line f argument being pursued by the U. S. Attorney ould easily, and would ordinarily, cause an alert de- nse counsel to expect further and possibly even ore pointed comments on the subject. Defense coun- l's only alternative is to object to the line of argu- ent in the hope that it would stop before reversible ror was committed. This is exactly what defense unsel Kay did when he said:

> "Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have."

If the Court had overruled the objection at that int, the authorities would no doubt sustain the ling. The Court commenced to speak and the tran- ript shows the following occurred:

> "The Court. Well——"

Instead of permitting the Court to rule, Mr. Plum- er, in his enthusiasm, had to break in or interrupt d say:

> "Mr. Plummer. I didn't mention *anybody,* except, why didn't they put on a defense." (Emphasis supplied.)

Instead of allowing the Court to rule, Mr. Plum- er has to point out to the Court, and the jury, that

no *person* was mentioned. Then, instead of making the ruling that had previously been interrupted or prevented by Mr. Plummer, the Court says:

> "The Court. That is correct. Objection overruled. If it had referred to an *individual,* then I would concur, Mr. Kay." (Emphasis supplied.)

Now the Court has to join with Mr. Plummer in pointing out to Mr. Kay, and incidentally to the jury, that no individual was named by Mr. Plummer in his argument, but that if he had mentioned an individual then the Court would concur with Mr. Kay. Instead of just overruling the objection the Court has to explain in the presence of the jury the actual limits of the rule.

This comment by the Court then provoked the following comment by Mr. Kay:

> "Mr. Kay. They referred to the three individuals at this counsel table and no one else."

Mr. Kay's comment was obviously provoked by the Court in using the word "individual" in the first place and represents the ultimate that Mr. Kay can do under the circumstances to point out to the Court the error of his ruling. The Court then indicates that actually, in the Court's own mind, Mr. Plummer had been referring to the three individuals at defense counsel tables in the first place by saying:

> "The Court. Of course, that is true."

Judge McCarrey was thoroughly frank about the whole matter, to say the least. To have denied the truth of Mr. Kay's analysis when he actually personally thought otherwise would have been intellectual

ishonesty on a matter where an accused's constitu-
ional rights were being decided. However, even
hough the discussion had gone too far to be saved
y an instruction to the jury, and not because of de-
ense counsel Kay's original objection, the Court
ailed to attempt to correct the matter in any fashion
hatsoever. The Court's failure to insist upon ruling
n the first place without interruption from Mr.
lummer turns out to have been a mistake. Mr. Plum-
er's insistence in pointing out to the Court how
ght he was aggravates his original mistake, that of
nterrupting the Judge. The Judge then compounds
he errors after ruling, by attempting to explain his
uling and then finally, in effect, admits that Mr. Kay
as right in the first place.

It is submitted that on the particular and peculiar
acts here presented this Court should rule that re-
ersible error was committed.

THAT THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO INSPECT THE CONFESSION TAKEN FROM HIM PRIOR TO ITS ATTEMPTED INTRODUCTION INTO EVIDENCE DURING THE COURSE OF THE TRIAL.

The appellant's motion was based on Rule 16 of
he Federal Rules of Criminal Procedure which reads
s follows:

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to

> the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions that are just."

It is conceded that probably the *numerical* weight of the decisions construing this rule is that a defendant cannot require the Government to furnish him, prior to trial, with a copy of his statement or confession. Barron, Federal Practice and Procedure, Volume 4, Sec. 2032, pages 126-127.

Many of the decisions are based on the reasoning that a confession is not a paper, document or tangible object, obtained from or belonging to the defendant. *U.S. v. Black,* D.C. Ind., 6 FRD 270, 1946.

Another reason given is that discovery in criminal proceedings is limited and was intended to be limited because of the nature of the issues, the danger of intimidation of witnesses and the still greater danger of perjury and subornation of perjury. *U.S. v. Malinsky,* D.C. N.Y., 19 FRD 426, 1956.

Most of the decisions seem to agree that the granting or denying of a motion to produce and permit inspection of a statement or confession lies in the discretion of the trial Court. Presumably, from the wording of the rule, the discretion of the trial Court should be exercised with respect to two considerations, namely:

1. Whether the item sought is material to the preparation of the defense.
2. Whether the request is reasonable.

No decision was discovered by the writer which held that the trial Court had abused its discretion in refusing to permit the discovery requested. However, as is pointed out, the main body of the decisions on the subject have not been appealed.

In arguing the motions to produce in this case commencing at page 34 of the transcript it appears that defense counsel Kay mistakenly argued the case of *Monroe v. U.S.* 234 F. (2d) 49, as being a decision of the Ninth Circuit Court of Appeals. This decision actually was from the Circuit Court of Appeals for the District of Columbia in 1956. The case does seem to hold, however, that pretrial discovery would have been permitted with respect to the recordings involved if the defense had not already been permitted to inspect before the motion was actually made.

No cases were discovered by the writer which based the refusal to permit discovery strictly on the grounds that the items sought were not material to the preparation of a defense and that the request made was actually unreasonable.

In the writer's opinion too many of the cases are based on reasoning such as is contained in *Shores v. U.S.*, 174 F. (2d) 838, 843, to the effect that the rule can't possibly mean what it says. In that case the Court said in its decision at page 843:

> "In a general sense, of course, a confession may be regarded as a paper or document 'obtained'

> from the defendant, but reading the language of the rule in the light of the history involved in its formation and in its context, we do not believe that such was its intended legal connotation and purpose here."

The decision then goes on to justify its ruling by discussing the Notes of the Advisory Committee. Other decisions examined by the writer have done the same.

Judge McCarrey in ruling on the motions in this case was likewise guided by the Advisory Committee. (Tr. 51.) His decision appeared to be based on the case of *U.S. v. Black,* 6 FRD 270. It is significant, however, that nowhere in the discussion of the motions and argument by defense counsel and the U. S. Attorney was it contended that the confessions were not material to the preparation of a defense nor that the requests made were unreasonable.

It would appear from a reading of Rule 16 that a denial of discovery would be an abuse of discretion unless the Court based its refusal on one or the other of the two grounds for refusal.

In this case the copies of the confession were signed by the appellant while in the Federal Jail in Seattle under circumstances previously outlined. Not once in ten thousand times would an accused under the circumstances demand a copy of the confession as a condition to signing it, yet it would seem that once the accused signed his name to the confession that it would belong to him. Others may have performed to cause writing to appear on the paper, but such writing

meaningless and certainly is not a confession until e accused has taken the paper in hand and endorsed s signature. At that moment a document comes into ing which can properly be called a confession. The nfession is then taken from the defendant by the ficers. This would appear to fall exactly within the ording of the rule as a paper or document "ob-ined from" the defendant, and is entirely consistent ith the reasoning in the *Shores* case cited above.

The Court's attention is respectfully invited to the se of *U.S. v. Klein, et al.,* D.C., S.D. N.Y., 18 RD 439, 1955, where the defendant sought discov-y and inspection of statements voluntarily made to vernment agents which were transcribed by a enographer. Judge Sugarman had no trouble at all a very short opinion in finding that the requisites Rule 16 were satisfied in that the statements were btained from" the defendant; are "material to the eparation of his defense" and the request was "rea-nable".

It is submitted that since no argument was made the U. S. Attorney that the items sought were not aterial to the defense or that the requests were un-asonable and since the ruling of the Court was not sed on either of these points that the trial Court as guided entirely by precedent and not by the word-g of the rule.

Dated, Anchorage, Alaska,
November 17, 1958.

Respectfully submitted,
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